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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 47

ERIE RAILROAD COMPANY and NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY,

Appellants,

vs.

BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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TABLE OF CONTENTS

PAGE

MOTION TO AFFIRM 1

STATEMENT OF THE CASE 2

ARGUMENT—The decision of the District Court presents no question of substance warranting further argument in this Court 4

I—Abandonment versus Partial Discontinuance of Service 5

II. Appellant's Passenger and Freight Ferries a Single, Integral Portion of a Line of Railroad 10

III. Relative Importance of the Instant Case 11

IV. The District Court's Compliance With Proper Standards of Review 14

CONCLUSION 15

Cases Cited

Alabama Public Service Commission v. Southern R. Co., 341 U. S. 341 (1951) 6

Atchison T. & S. F. Ry. Co. v. Railroad Comm. of California, 283 U. S. 380 (1931), syllabus No. 1 9

Banta v. United States, 152 F. Supp. 59 (D. N. J., 1957) 6

Board of Public Utility Commissioners of the State of New Jersey et al. v. United States of America et al.—Civil Action No. CI-559-57, 158 Fed. Supp. 98 (New York Central-Weehawken Ferry Case) 4, 6, 6fn, 13

PAGE

Central Railroad Company of New Jersey Trustees Ferry Abandonment, 249 I.C.C. 269 (1941)..... 7

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382..... 11

Colorado v. United States, 271 U. S. 153 (1926)..... 12

Delaware, Lackawanna & W. R. R. Ferry Abandonment, 290 I.C.C. 809 (1954), affirmed in Board of Public Utilities Commissioners v. United States, 132 F. Supp. 379 (1955)..... 9

East Texas Lines, Inc. v. Frozen Food Exp., 351 U. S. 49 (1956)..... 14

Erie Railroad Company Ferry Abandonment, 252 I.C.C. 659 (1942)..... 6fn, 8

Hoboken Ferry Company et al. Abandonment, 257 I.C.C. 51 (1946)..... 8

Morris and Essex Railroad Co. Abandonment, 175 I.C.C. 49 (1931)..... 7

Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294..... 6

Palmer v. Massachusetts, 308 U. S. 79 (1939)..... 6

Seatrain Lines v. U. S. et al. (Del. 1946) 64 F. Supp. 156, aff'd (1947), 329 U. S. 424, 91 L. Ed. 396, 67 S. Ct. 435..... 6

Skidmore v. Swift & Co., 323 U. S. 134 (1944)..... 14

Social Security Board v. Nierotko, 327 U. S. 358 (1946)..... 14

Stark v. Wickard, 321 U. S. 288 (1944)..... 13

United States v. Idaho, 298 U. S. 105 (1936)..... 14

Yonkers v. United States, 320 U. S. 685 (1944)..... 14

Statutes Cited

PAGE

28 U. S. C. 1253 2

49 U. S. C. A. (Interstate Commerce Act):

Sec. 1 6

Sec. 1(3)(a) 10, 10fn

Sec. 1(18) 4, 5, 7, 8, 11

Sec. 1(19) 7

Sec. 1(20) 7, 12

Rule Cited

Revised Rules—Rule 16, paragraph 1(c) 1

Miscellaneous

Report of the Commission dated August 14, 1957 3

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ERIE RAILROAD COMPANY

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BOARD OF PUBLIC UTILITY COMMISSIONERS OF THE STATE OF NEW JERSEY, THE STATE OF NEW JERSEY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

On Appeal from the United States District Court for the District of New Jersey

Motion to Affirm

Pursuant to Rule 16, paragraph 1 (c), of the Revised Rules of this Court, the appellees, Board of Public Utility

Commissioners and State of New Jersey * move that the judgment of the District Court for the District of New Jersey be affirmed on the ground that the questions raised by the appellants are so unsubstantial as not to warrant further argument.

Statement of the Case

This is a direct appeal from a judgment of a statutory three-judge court entered December 31, 1957, pursuant to 28 U.S.C. 1253 which set aside permanently the enforcement of an order and certificate issued by the Commission in Finance Docket No. 19247, Erie Railroad Company Ferry Abandonment, Finance Docket No. 19351—New York, Susquehanna and Western Railroad Company Abandonment of Ferry Use; and Finance Docket No. 19374—New Jersey and New York Railroad Company, Trustee, Abandonment of Ferry Use, dated June 26, 1957. The permanent injunction order and decree was entered December 31, 1957. The order and certificate of the Commission purported to authorize the abandonment of Erie's passenger ferry line across the Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York and abandonment of use under contract of the aforesaid ferry by Susquehanna and the Trustee. The certificate was to have become effective from and after fifty days from its date to wit: August 15, 1957.

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* Throughout this Motion to Affirm we will refer to Erie Railroad Company as "Erie"; New York, Susquehanna & Western Railroad Company as "Susquehanna"; Interstate Commerce Commission as "Commission"; State of New Jersey as "State"; Board of Public Utility Commissioners of New Jersey as "Board"; Brotherhood of Locomotive Engineers as "Brotherhood"; United States Court for the District of New Jersey as "District Court"; Trustee for New Jersey and New York Railroad Company as "Trustee"; Delaware, Lackawanna & Western Railroad Company as "Lackawanna" and New York Central Railroad Company as "Central".

In its Report of August 14, 1957, denying Board and State's petition for modification the Commission based its decision upon the theory that the passenger ferries and service of Erie are maintained physically separate and apart from the carfloat and lighterage equipment and other facilities used in transporting freight across the Hudson River and that the routes of water freight service are different from the routes of the passenger ferry service. The Commission held that the passenger ferry and lighterage service

> "* * * is therefore analogous to two extensions of lines of railroad, one of which is used exclusively to transport passengers and the other exclusively to transport freight. Abandonment of all passenger operations over the extension used exclusively in transporting passengers in such circumstances amounts to a complete abandonment of a line of railroad for which our authorization is required under Section 1 (18). See *New York Central Ferry Abandonment,* 295 I.C.C. 385 (388-391)."

The Board of Public Utility Commissioners of the State of New Jersey and the State of New Jersey filed in the District Court a complaint seeking review of the order of the Commission. The Brotherhood intervened as Plaintiff and Erie and Susquehanna intervened as Defendants. The District Court held that the appellant Erie's passenger ferries and freight ferries, lighters and carfloats make up a portion of the appellant Erie's line of railroad between Jersey City, New Jersey and Chambers Street, New York City, New York. After considering pertinent decisions, including decisions of this Court and of the Commission itself with respect to partial discontinuances of operations over a line of railroad or a portion thereof, the District Court concluded that the certificate granted to the appel-

lants for abandonment of Erie's passenger ferries and use thereof by Susquehanna and Trustee without simultaneous abandonment of freight service was in excess of the statutory powers of the Commission and must be set aside.

The Court did not pass upon the other questions raised by Appellees, the Board and the State, which related to the merits of the case.

ARGUMENT

The decision of the District Court presents no question of substance warranting further argument in this Court.

It is well settled by decisions of this Court and of the Interstate Commerce Commission that the power of the Commission, under Section 1(18) of the Interstate Commerce Act, to authorize the abandonment of a portion of a line of railroad does not include the power to authorize partial discontinuance of service over a portion of a line of railroad.

The correctness of the District Court's conclusion that the rule established by these decisions is applicable to appellate Erie's passenger and freight service, as a portion of that appellant's line of railroad between Jersey City, New Jersey and Chambers Street, New York City, New York is clearly demonstrated in the District Court's opinion in this case and in its opinion in *Board of Public Utility Commissioners of the State of New Jersey et al.* vs. *United States of America et al.*—Civil Action No. CI-559-57, 158 Fed. Supp. 98, (New York Central-Weehawken Ferry Case).

The application of the abovementioned decisions to the passenger and freight ferry services operated by the appellant Erie and used by appellant Susquehanna across the Hudson River raises no question of national importance.

After considering applicable cases, the District Court reached a decision that was made with obvious care, full appreciation and application of the standards of review laid down by this Court.

I. Abandonment versus Partial Discontinuance of Service

The Commission cites as its sole authority for the issuance of the Order and Certificate of June 26, 1957, Section 1, Paragraph 18 of the Interstate Commerce Act. The said paragraph, as incorporated in 49 U.S.C. §1 (18), reads as follows:

> "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, *and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.* * * * " (Emphasis supplied).

The Interstate Commerce Commission is an administrative tribunal whose jurisdiction is founded upon the act creating it. This jurisdiction is defined by statute and the Commission may not attempt to exercise any jurisdiction not expressly conferred by statute or reasonably implied

therein. *Seatrain Lines* vs. *U. S. et al.*, (Del. 1946) 64 F. Supp. 156 aff'd (1947), 329 U. S. 424, 91 L. ed. 396, 67 S. Ct. 435.

The cases in which this Court has held that elimination of part of the service of a portion of a line of railroad does not fall within the meaning of the said paragraph, include the following, which were cited by the District Court in the *New York Central-Weehawken Ferry* case, *supra**, *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); and *Alabama Public Service Commission* v. *Southern R. Co.*, 341 U. S. 341 (1951). The *Palmer* decision was cited by a three-judge District Court in *Banta* v. *United States*, 152 F. Supp. 59, 60 (D. N. J. 1957), in connection with the statement that "it was agreed between the parties that the Interstate Commerce Commission has no authority to allow a railroad to discontinue an individual interstate train." The judgment of the District Court, rejecting "the novel contention" that the Commission has such authority under a section of the Act other than Section 1, was affirmed by this Court in a *per curiam* opinion, Case No. 506, November 12, 1957, 355 U. S. 33, 34.

The first of the twelve decisions of the Interstate Commerce Commission to the same effect cited by the District Court in the *Central* case was issued in 1925, and may be regarded as involving "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315. The last of these decisions so cited was issued in 1954. The twelve de-

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* The District Court stated that the identical and decisive jurisdictional problem decided by that Court in the *Central* case appears in the *Erie* case, therefore the *Central* decision should be considered here as a related decision.

cisions reflect a well-considered and long-established administrative interpretation of Section 1(18) of the Act.

Regarding *Morris and Essex Railroad Co. Abandonment*, 175 I.C.C. 49, 52 (1931), one of the most striking of the decisions just mentioned, the District Court said "* * * the application asked for total abandonment, both freight and passenger, of a portion of a railroad line and of just the passenger service of the balance. * * * The Commission recognized its jurisdiction over the first part of the application but, holding [that] it had no authority over the second and that the latter was an essential constituent of the application, denied the entire request".

The four cases in which the Commission issued certificates, between the years 1941 and 1954, purporting to authorize abandonment of trans-Hudson passenger ferries operated by railroad companies which continue to operate trans-Hudson freight ferries, do not reflect a well-considered or long established administrative interpretation of Sections 1 (18-20) of the Act.

(a) The jurisdiction of the Commission was not challenged in any of those four cases.

(1) In *Central Railroad Company of New Jersey Trustees Ferry Abandonment*, 249 I.C.C. 269 (1941), the applicant sought authorization "to abandon a portion of its line of railroad consisting of a ferry between Jersey City, Hudson County, N. J., and West Twenty-third Street, New York, New York County, N. Y." No objection to the application was offered. The Commission, in its report, made no express finding of jurisdiction under Section 1 (18) of the Interstate Commerce Act. It noted that the operation of the railroad's remaining passenger ferry (the Liberty Street ferry) on a 24-hour basis would relieve to a large extent whatever inconvenience might be suffered by patrons of the line to Twenty-third Street.

(2) In *Erie Railroad Company Ferry Abandonment*, 252 I.C.C. 659 (1942), the applicant sought authorization "to abandon the Erie System ferry between Jersey City and West Twenty-third Street, New York City." The Commission's report contains the statement that the applicant's ferry service to New York City is performed by a pool of seven vessels and that the operation of the applicant's Chambers Street ferry is to be continued with an additional boat to be operated throughout the day. It contains no express finding of jurisdiction under Section 1 (18) of the Interstate Commerce Act.

(3) The third case, *Hoboken Ferry Company et al. Abandonment*, 257 I.C.C. 51 (1946) relates to one of the three passenger ferry operations that were operated by the Delaware, Lackawanna and Western Railroad Company, until 1946, between that company's Hoboken terminal and New York City: to Twenty-third Street, Christopher Street and Barclay Street, respectively. The ferry involved in this case ran to West Twenty-third Street. The Commission stated in its report that the Lackawanna was using, on its three "ferry line or routes", a pool of 13 vessels (24 hours a day to and from Twenty-third Street, 5 A.M. to 9 P.M. except Sundays to and from Christopher Street, and 5:30 A.M. to 12:30 A.M. daily to and from Barclay Street) and that, if abandonment of the Twenty-third Street ferry was permitted, the Lackawanna proposed to operate the Christopher Street ferry 24 hours [illegible] and place an additional boat in service on that route. The report does contain an express finding that the Twenty-third Street ferry was a line of railroad within the meaning of Section 1 (18) of the Act and that "the proposed abandonment" was subject to the jurisdiction of the Commission under the said section. This finding was made in view of the suggestion of the *applicants* that the discontinuance of the Twenty-third Street ferry might be regarded as a transfer of

service to Christopher Street rather than as an abandonment of the Twenty-third Street ferry. The Commission held, quoting syllabus No. 1 of *Atchison T. & S. F. Ry. Co. v. Railroad Comm. of California*, 283 U. S. 380 (1931) that its approval must be obtained, under the head of "rearrangement, extension and abandonment of tracks, and the use of the terminal facilities", even if "the proposed abandonment" were considered as merely "a relocation of terminal facilities in New York City".

(4) *Delaware, Lackawanna & W. R. R. Ferry Abandonment*, 290 I.C.C. 809 (1954), affirmed in *Board of Public Utilities Commissioners* v. *United States*, 132 F. Supp. 379 (1955), involved the above-mentioned Christopher Street ferry. The report of the Commission in this case was not printed. It appears from the decision of the three-judge District Court which affirmed the order of the Commission authorizing abandonment of the Christopher Street ferry that the applicant undertook to continue to operate the Barclay Street ferry around the clock. The District Court in the *Central* case, including one of the judges who sat in the *Lackawanna* case, states that the Commission's jurisdiction was not challenged in the latter case, was never before the Court and was not passed upon by the Court in that case.

(b) The first of these cases was decided twenty-one years after the adoption of the provision of the Act by which the Commission was given jurisdiction in matters of abandonment. The element of contemporaneousness of interpretation was therefore absent.

(c) Upon consideration of these four cases together it appears that the Commission exercised jurisdiction somewhat absent-mindedly in the first two cases and that its express finding of jurisdiction in the third case was based largely upon the consideration of instances in which the

discontinuance of a particular service over a line of railroad would result in the trackage involved no longer being required for use in interstate commerce. There was no examination as to whether "trackage", toward which the carrier has a maintenance responsibility, is fairly equivalent to a waterway toward which the carrier has no maintenance responsibility. The Commission did not in any of these four cases consider the significance of the fact that an extension of the line of railroad of a railroad which holds itself out as a common carrier of persons and goods must include equipment for the carriage of both persons and goods. The last-mentioned fact does not appear to have been brought sharply into focus in any of these four cases.

II. Appellant's Passenger and Freight Ferries a Single, Integral Portion of a Line of Railroad

Appellant's passenger ferry service and its freight service across the Hudson River between Jersey City, New Jersey and Chambers Street, New York City, New York, is an integral portion of a line of railroad between Chicago, Illinois and New York City. The routes traversed by units of the appellant's floating equipment in the transportation of persons and goods across the Hudson River constitute a single integral portion of the appellant's line of railroad from Jersey City, New Jersey to New York City, New York.

The passenger and freight ferry service between Jersey City, New Jersey and New York City, New York operated in connection with the railroad, is clearly within the definition of the term "railroad" as set forth in 49 U.S.C.A. Section 1 Paragraph (3)(a).* This has not been contested by

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* 49 U.S.C.A. Section 1(3)(a): "The term 'railroad' as used in this chapter shall include all bridges, *carfloats, lighters* and *ferries* used by or operated in connection with any railroad * * *." (Emphasis supplied)

any of the parties to this proceeding. See *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382, which is in conformity with the appellees' position.

The District Court found that the appellant Erie furnishes passenger and freight transportation across New York Harbor to New York City, that there is nothing substantial in the record to justify the Commission holding that there is such a distinction between the passenger and freight ferry services after these services are water-bound between Jersey City and the railroad's terminus in New York City, as to turn them from a portion of a railroad line into two or more railroad lines or portions thereof. In support of this, the District Court pointed out that the passenger and freight ferries have the one General Superintendent; that they have one set of repair facilities; that freight trains of the line do not unload or load in the passenger terminal at Jersey City; that the freight depot is adjacent to the passenger station; that freight ferries are immediately north of the Erie-Jersey City passenger slips; and that on the Manhattan side, the freight carfloats and lighters do not land in the passenger ferry slips because of convenience to passengers and that special passenger boats and freight equipment are required. The District Court went on to say "But common-sense does not support the proposition that the mere dropping of the harbor passenger service from its passenger and freight-carrying railroad to New York City brings the Erie within Section 1 (18) of the Act and empowers the Commission to permit the discontinuance."

III. Relative Importance of the Instant Case

Both the appellants, Erie and Susquehanna, contend that the jurisdictional questions presented have substantial questions of federal jurisdiction which are of such importance that they transcend the rights of the litigants

and are of national importance to the railroad industry and administration of the Interstate Commerce Act.

The principle of law that the Interstate Commerce Commission has jurisdiction to authorize the discontinuances of passenger ferry service operated over an extension of a line of railroad separate and apart from the operation of freight service over the same line is well stated in the various decisions considered by the District Court. The only difference is that the prior decisions differ in the application of facts to the principle in that they deal with lines or portions of lines of railroad located upon the land, while the case before the Court deals with a portion of a line of railroad which is an extension over water. To distinguish the application of the principle of law involved merely because of the difference in the mode of transportation would be a failure to recognize the distinctions which are necessary as a practical matter in transportation over water.

The decision of this case depends upon the determination of the intent of Congress in the adoption of a statutory provision which has been interpreted by an administrative agency of the United States in a way to which the parties, including a state government, which has standing to do so under paragraph (20), section 1 of the act, *Colorado* v. *United States*, 271 U. S. 153 (1926), object in a Court of the United States. The executive and judicial departments of the Government of the United States have certainly no interest in having this statutory provision interpreted and applied in a manner at variance with the intent of the legislative department, which has sole responsibility under the Constitution for fixing the limits of the power that it has delegated to the Interstate Commerce Commission.

> "When Congress passes an Act empowering administrative agencies to carry on governmental activities,

the power of those agencies is circumscribed by the authority granted." *Stark* v. *Wickard*, 321 U. S. 288, 309 (1944)

The District Court has discharged its responsibility by deciding the issue of jurisdiction in accordance with the law as it stands. As the District Court states at page 103 of the *Central* decision, *supra*, Congress may decide to grant the Commission jurisdiction which it has not yet granted, but "until that time, the Commission, strictly a creature of its creating statute," is, in the District Court's opinion, without the power to permit the discontinuance of the partial service rendered by the appellant by passenger ferries across the Hudson River.

The financial solvency of the appellant and of other railroads is, of course, a matter of concern to this Court in any case in which it is shown to this Court that the intent of the Congress to provide procedures for the reduction of burdens on interstate commerce may have been thwarted by the decision of a three-judge District Court. It is submitted that it is clear from a reading of the decision of the District Court in this case that the statutory provision in question has been correctly interpreted and applied by that Court.

It is not the purpose of this motion and brief to argue the merits of the case with respect to Commission's failure to consider (1) Erie's financial condition as a whole, (2) changed operating conditions, (3) lack of adequate alternative service, and (4) whether or not the Commission's determination resulted in discrimination against certain of Erie's passengers in that they would be forced to ride the Hudson and Manhattan Railroad at a greater cost than to those who ride the ferries of the Delaware, Lackawanna and Western Railroad.

Any reliance by appellants upon alleged passenger deficits in showing the importance of the case is immaterial in view of the decisive issue as to whether the proposed change in ferry operations constituted a complete abandonment of a line of railroad or merely a curtailment of service.

IV. The District Court's Compliance With Proper Standards of Review

In rendering its decision, the District Court gave due weight and consideration to the findings and determinations of the Commission as has been demonstrated throughout this motion. Each and every factual situation was considered and weighed. All pertinent principles of law were applied. The District Court reached the only legal and logical conclusion possible after taking into consideration the nature of the transportation of passengers and freight upon land and water, which of necessity entails equipment suited for the purpose of passenger transportation or freight transportation.

With respect to the issue of jurisdiction, it must be borne in mind that an administrative body may not finally decide the limits of its statutory power. That is a judicial function. *Social Security Board* v. *Nierotko,* 327 U. S. 358 (1946).

The Commission's decisions are entitled to great deference because of its expertness in its field of regulation. The same applies to the Board. Yet neither agency, no matter how expert it may be, can make a determination as to its jurisdiction which is conclusive. *Social Security Board* v. *Nierotko, supra; East Texas Lines, Inc.* v. *Frozen Food Exp.,* 351 U. S. 49 (1956); *United States* v. *Idaho,* 298 U. S. 105 (1936); *Yonkers* v. *United States,* 320 U. S. 685 (1944); *Skidmore* v. *Swift & Co.,* 323 U. S. 134 (1944).

CONCLUSION

For the foregoing reasons, we submit that the decision of the District Court is correct and this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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